Default judgment set aside without costs

A recent District Court case is believed to be the first in Queensland in which r5 UCPR has been used to support the setting aside of a regularly entered default judgment without a costs order.

Setting aside of default judgment – judgment regularly entered – judgment signed without notice to solicitors known to be acting – implications of UCPR r 5 – judgment set aside without costs

In *Gavin Boyle Constructions Pty Ltd v Fabrok Pty Ltd* [2011] QDC 214 McGill DCJ set aside a regularly entered default judgment, but declined to make an order requiring the first defendant to pay the plaintiff's costs of signing the judgment and setting it aside.

The default judgment had been signed without prior notice to solicitors who were known to be acting for the first defendant. The judge relied on rule 5 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) as justifying his decision to make no order as to costs.

Facts

The primary claim in the proceeding was for damages for breach of contract. The plaintiff alleged a contract entered between the plaintiff and the first defendant in 2007 for the sale of certain concrete columns to the plaintiff, and that under the *Sale of Goods Act* there was an implied term that the columns would be of merchantable quality. The plaintiff further alleged that the first defendant was in breach of the contract because the columns were not of merchantable quality because they had developed cracks. The plaintiff claimed damages for the costs associated with rectification of the columns.

Until proceedings were commenced, the solicitors for the first defendant had in their correspondence with the plaintiff denied liability, though on the grounds that the plaintiff's complaint related to a manufacturing defect, and that the first defendant had simply taken an order for the columns and passed the order on to the manufacturer of the columns.
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The claim was filed on 27 October 2010. It was served by sending a copy of a letter to the first defendant's registered office, under cover of a letter dated that day. The registered office was at a firm of accountants. The accountant scanned the documents and attempted to email them to the person in charge of the first defendant, but it appeared there was a problem with the email provider at the time, and that the email was not received. As the time for filing a notice of intention to defend had expired, default judgment was signed against the first defendant on 21 December 2010 for damages to be assessed.

There was evidence that the first defendant had not been aware of the proceeding until there was correspondence from the plaintiff's solicitors after the default judgment had been signed. It also appeared that no attempt was made before signing the default judgment to make contact with the solicitors who had corresponded on behalf of the first defendant, to advise that the proceedings had been served or to inquire whether a notice of intention to defend and defence was to be filed.

The first defendant applied to set aside the default judgment.

Legislation

Rule 290 of the UCPR provides a specific power for the court to set aside or amend a default judgment. It provides:

> "290. The court may set aside or amend a judgment by default under this division, and any enforcement of it, on terms, including terms about costs and the giving of security, the court considers appropriate."

Rule 5 of the UCPR explains the philosophy of the rules and the overriding obligations of parties and the court. Rules 5(1) and 5(2) stipulate:

> "5.(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
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> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules."

Analysis

McGill DCJ noted that the judgment had been entered regularly. It was accordingly necessary on the application to set the judgment aside for there to be evidence that the defendant had *prima facie* a good arguable defence on the merits. His Honour indicated that on the pleadings as they stood it appeared that the only real issue at the trial would be the factual issue of whether the columns were of merchantable quality. He discussed in that context the various expert reports that were in evidence, and noted that additional expert evidence may clarify the position one way or the other. His Honour did not regard the case as one in which it could confidently be said that the defendant would not succeed in establishing at trial that the goods were not of merchantable quality. The judge concluded that in these circumstances there had been shown *prima facie* a good arguable defence on the merits.

The judge also said there was no reason to doubt that a notice of intention to defend and defence would have been filed if the communication difficulty between the accountants and the first defendant had not arisen, or the proceedings had been otherwise brought to the notice of the person in control of the first defendant, or the solicitors acting for the first defendant. His Honour was satisfied that this provided a good explanation for the failure to file those documents in a timely way.

The judge ordered that the default judgment be set aside, and set the time for filing and service of the notice of intention to defend and defence of the first defendant to 27 September 2011.

Costs

On the question of costs, McGill DCJ noted (referring to *Troiani v Alfost Properties Pty Ltd* [2002] QCA 281) that where an application to set aside a regularly entered default judgment succeeds, it is ordinarily on terms that the defendant pay the plaintiff's costs of signing the judgment and setting it aside.

However, in this case the judge was concerned by the plaintiff's failure to inquire whether the proceeding would be defended before signing the default judgment. In his Honour's view this had caused unnecessary expense in terms of the costs of signing the default judgment and costs of the application to set it aside. The judge said that it probably also had the effect of delaying the filing of a notice of intention to defend and defence by some months. His Honour endorsed the approach taken in *Coburn v Brotchie* (1890) 16 VLR 6, where such a factor was taken into account in determining the appropriate costs order.

McGill DCJ also referred to the philosophy of the rules as set out in r5 of the UCPR as providing support for the view that he should act so to pursue the objective of avoiding undue delay and expense.

The judge acknowledged that there had also been problems with the conduct of the first defendant, including the failure to gather all necessary evidence in the time that had passed, and delay in making the application to set the default judgment aside. However his Honour concluded that it was appropriate in all the circumstances to make no order as to the costs thrown away by signing judgment or the costs of the application to set it aside.

Comment

It has not been uncommon in practice for a plaintiff to enter judgment without giving notice to solicitors who have corresponded on behalf of the defendant. The failure to give such notice might well have been viewed as demonstrating a lack of professional courtesy, particularly if the plaintiff's solicitors might reasonably have anticipated that a notice of intention to defend and defence would be filed.

However, this appears to be the first occasion in Queensland in which the philosophy of the rules as expressed in r5 of the UCPR has been used to support a departure from the usual costs order on an application to set aside a default judgment which has been regularly entered, though without such notice. The decision has obvious implications for practitioners. It also provides a further demonstration of the persuasive influence of r5 of the UCPR on all aspects of modern litigation.